Strict Neutrality: The Next Step in First Amendment Interpretation

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Strict Neutrality: The Next Step in First Amendment Development?

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In the world of Church-State scholarship writers are usually grouped into opposing camps called Absolute Separationists and Accommodationists. Both groups attempt to interpret the First Amendment religion clauses but draw radically different conclusions about what the First Amendment requires of us today. Those who espouse other positions are either ignored or, worse yet, accused of being closet separationists or accommodationists (depending on the perspective of the accuser). Yet there is another position gaining ground. In the 25 years since the concept of strict neutrality emerged success has come almost inadvertently.¹ The Supreme Court, without adopting the concept of strict neutrality has begun to use the terminology of neutrality on occasion, and the major casebook in the field has the intriguing title, Toward Benevolent Neutrality, a term the authors conveniently leave undefined.² Unfortunately the term “neutrality” has almost as many meanings as the more generalized concept “separation.”

To understand the strict neutralist position it is helpful to begin with two presuppositions. (a) When the Founders wrote the First Amendment they did not write with either the clairvoyance or the specificity that would make it easy to apply their principles to problems arising in contemporary church-state relations. There are various strands in the Founders thought which allow not only for conflicting interpretations but for contemporary adaptation. (b) We live almost two hundred years since the First Amendment Religion Clauses were penned and enormous changes have taken place, changes far beyond what the Founders could have imagined.

Granted these presuppositions, the challenge in constitutional theorizing is to create a principle of interpretation which (1) remains as faithful as possible to the language of the Constitution and the intent of the Founders, (2) is realistic, i.e., acknowledges political and economic reality and which (3) resolves problems in a manner seen as just, fair and required by the constitution. Before undertaking that challenge, further reflection on the presuppositions may be helpful.

Varieties of Separation

The term “separation of church and state” although never appearing in the constitution, has become so enbedded in American consciousness that it seems to sum up what is meant by the First Amendment religion clauses. Small wonder. The term is so broad it can embrace a wide variety of beliefs and practices, and allows groups espousing any one of several policy agendas to wrap themselves in the mantle of the Constitution. Our first task is to sort out the divergent meanings of the term “separation” and determine which best meet the challenges of constitutional theorizing.

Separation, in the First Amendment context, is a generic term
which has at least five distinct meanings.³ The most fundamental is *structural separation*, and distinguishes most Western systems from such organic systems as exist in Iran, Saudi Arabia and other Muslim countries. The characteristics of structural separation are independent clerical and civil offices, separate organizations for government and religions, different personnel performing different functions, separate systems of law and independent ownership of property and the absence of any officially designated church or religion. Jefferson, Madison and most of the other Founders accepted the need for structural separation, and where they found remnants of organic relationships, as in parts of common law, they worked to remove them. It may be that this is as far as their thought had progressed at the time, although there are clues that they wanted something more.

*Absolute separation* is a type vigorously pursued by some interest groups in this country. It is more of a financial separation than anything else, holding that no aid of any kind should flow from government to religion or churches, and no financial support should flow from religion or churches to the government. Absolutists would take as normative Justice Black’s description of the Establishment clause in *Everson v Board of Education*.

The “establishment of religion” clause of the first amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect “a wall of separation between Church and State.”⁴

The difficulties facing the advocates of absolute separation are twofold. First, it is by no means clear that the Founders intended this specific a meaning of separation.⁵ Second, historical practice in the United States, including contemporary practice, has included enormous amounts of aid, both direct and indirect, flowing to religion from government in return for enormous amounts of mostly indirect aid from religion.⁶ This is a political and economic reality absolutists may rally against, but it is so imbedded in law and practice that it is unlikely to change in the foreseeable future. Absolutists are left in the awkward position of claiming as constitutional principle—a law to be obeyed—something that has never existed and is never likely to. Ab-
solute separation is an ideal, not a reality. Unfortunately for ab-
solutists, the Constitution, unlike the Declaration of Independence, has
the force of law and is meant to be obeyed as well as admired.

Transvaluing separation is less understood in the United States,
but does have a devoted following. It holds that one objective of
government is to secularize the political culture of the nation, that is, to
reject as politically illegitimate the use of all religious symbols, or the
appeal to religious values, motivations or policy objectives in the
political arena. Transvaluing separation would deny all aid to religious
organizations under any circumstances. It is this type of separation
that is touted in the Soviet constitution and law. One statement from
an American group that seems best to express this position is that of
the American Humanist Association:

To promote the "general welfare," a particular
measure may be favored by church interests, and con-
sequently pressure and influence are brought to bear
on the state's political machinery to assure its passage.
Or a measure may be viewed with disfavor by the
church with a resultant pressure on the state's political
machinery to assure its defeat. This type of activity by
the church harks back to pre-Revolutionary days both
here and in Europe, where there was "cooperation"
between government and church. But it was just that
sort of religion-political interplay that the Founding
Fathers tried desperately to prevent on American soil
by adopting the First Amendment and the correspond-
ing state laws. In any event, the Supreme Court has never accepted
transvaluing separation and it does not appear to have much promise
as a constitutional principle in the United States.

What has traditionally been called "accommodation" I would call
Supportive Separation. Those who hold this position acknowledge the
need for structural separation but would not drive the principle to the
extremes of the absolute or transvaluing types. To the contrary, sup-
portive separationists favor aid and support for religion, holding only
that government may not support one religion over another. This posi-
tion takes as normative Justice William O. Douglas' dictum that
We are a religious people whose institutions
presuppose a Supreme Being. We guarantee the
freedom to worship as one chooses. We make room for
as wide a variety of beliefs and creeds as the spiritual
needs of man deem necessary. We sponsor an attitude
on the part of government that shows no partiality to
any one group and that lets each flourish according to
the zeal of its adherents and the appeal of its dogma.
When the state encourages religious instruction and
cooperates with religious authorities by adjusting the
schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs.\textsuperscript{10}

Unfortunately for advocates of supportive separation the history of the battle for religious liberty in Virginia and of the framing of the First Amendment undermines any claim that this is what the Founders intended. In addition, a whole series of decisions indicates very clearly that the Supreme Court does not believe this is what the Constitution requires. Finally, there has been strong political opposition to such a position throughout American history.

\textit{Equal Separation} is that type which rejects all political or economic privilege, coercion or disability based on religious affiliation, belief or practice, or lack thereof, but guarantees to religiously motivated or affiliated individuals and organizations the \textit{same} rights and privileges extended to other similarly situated individuals and organizations. It provides protection to religion without providing privilege. It treats the right to religious belief and practice as a human right to be protected along with other human rights in an evenhanded manner. It protects the right of religiously motivated groups and individuals to participate in the political process and the economic system in the same manner and to the same extent as it protects the rights of other similar groups and individuals to participate.

A difficulty facing proponents of equal separation is that it is a concept only recently developed and therefore unfamiliar to most Americans. It has been viewed suspiciously by advocates of other types of separation who fear that it will lead to a decrease in protection for religious liberty or an increase in aid to religion. Nonetheless it is the basis for the strict neutrality approach to the religion clauses and will be further developed below. It has been argued that equal separation is most consistent with the thought of James Madison.\textsuperscript{11}

\textbf{Historical Developments}

Several developments of enormous proportions have made it impossible to apply the First Amendment religion clauses to contemporary problems in any simplistic fashion and still meet the requirements for constitutional theorizing posited above.\textsuperscript{12} Due to space limitations these will simply be listed. The first development is the application of the religion clauses to the states through the due process clause of the Fourteenth Amendment by the Supreme Court. This is not something the Founders foresaw.

A second unforeseen development is the transformation of both federal and state governments from passive-protective, minimalist governments to active-expansive, pervasive administrative bureaucracies. This change from a laissez-faire to a bureaucratic state with broad taxing, regulatory and spending powers has enormous implications for church-state relations.

Parallel to the expansion of government has been the expansion of religious organizations in population, physical institutions, activities undertaken and sheer variety of denominations, sects and cults.

A fourth major change is the invention of technologies which make
possible such new activities as mass education, mass communication, massive impersonal solicitation of funds, the fabrication of mind altering drugs, and in the very near future, genetic manipulation.

Finally, the sheer growth in population density, mobility and diversity has profoundly altered the environment within which religious organizations and activities exist and the laws affecting them are made. Density and mobility are significant because it is no longer easy for individuals to live solely among their own kind or shelter their children from exposure to competing values.

Taken together, these five developments since the First Amendment was written pose such difficulties in terms of potential conflict, discrimination and entanglement that legal theories which ignore them are doomed to failure. The task of the original Founders was to protect religious liberty from government. The contemporary task is to protect religious liberty in the midst of government. The same is true for preventing establishment while not discriminating against religion.

The Theory of Strict Neutrality

Strict Neutrality was proposed a quarter century ago by Professor Philip Kurland of the University of Chicago:

The thesis proposed here as the proper construction of the religion clauses of the first amendment is that the freedom and separation clauses should be read as a single precept that government cannot utilize religion as a standard for action or inaction because these clauses prohibit classification in terms of religion either to confer a benefit or to impose a burden.13

The thesis has been developed since then and some clarifications may be helpful. First, the purposes of the religion clauses can be summed up as freedom, separation, and equality. The application of the clauses in conjunction is both possible and necessary. It can be done by reading the clauses as an equal protection doctrine, or as Kurland explains:

For if the command is that inhibitions not be placed by the state on religious activity, it is equally forbidden the state to confer favors upon religious activity. These commands would be impossible of effectuation unless they are read together as creating a doctrine more akin to the reading of the equal protection clause than to the due process clause, i.e., they must be read to mean that religion may not be used as a basis for classification for purposes of government action, whether that action be the conferring of rights or privileges or the imposition of duties or obligations.14

The equal protection doctrine is a well developed component of constitutional law and can provide a firm foundation of dealing with current controversies in the church-state area, providing both consistency and flexibility. Acceptance of strict neutrality is not a denial that religion can be used as a classification to identify a significant personal interest or social unit. It would be incongruous to hold that the
Constitution could recognize the existence of religion but that the government based on that Constitution could not. Recognition of an objective fact of personal value preference or of social organization would not be a violation of the neutrality principle. Examples might be recognition of the presence of a church or synagogue when planning traffic control signals or assigning personnel to expedite traffic. Such recognition implies that in relevant secular aspects individual religious interests and social groups are similar to other interests and groups, not based on religious content, but on the other public and secular aspects of a religion's social organization. Put in other words, strict neutrality is committed to the proposition that there is seldom a legally significant characteristic of religion so unique that it is not shared by similar nonreligious individuals and groups. The conclusion to be drawn is that in most aspects, religious individuals and interests are subject to the same laws as other similarly situated individuals and groups.

But what happens when there is a claim based on a uniquely religious belief, e.g., when an Adventist cannot work on Saturday and requests unemployment compensation? Or a Mennonite refuses to have her picture on a driver's license? Or a Baptist church requires all its employees to be members of the church? Or what happens when a purportedly neutral law in fact imposes a significant burden on a religion or even prohibits a religious activity, e.g., an ordinance that prohibits door to door solicitation on weekends? In such cases religion may be treated as a suspect classification subject to strict scrutiny by the courts. A suspect classification is one in which there is "a presumption of unconstitutionality against a law implying certain classifying traits."15 If religion is considered a suspect classification, any statute utilizing religion or specifically impacting on religion is automatically suspect, will demand a very heavy burden of justification, and will be subject to the most rigid scrutiny. More than just a rational connection to a legitimate public purpose will be required. Nevertheless, if the standards of proof are met, the religious interest will be protected.

The suspect classification concept is used most frequently to prohibit racial and sexual discrimination, but it can equally well be used to preserve government neutrality in respect to religion. The question immediately arises: what are the principles that justify such a classification and define its limits? Professor Donald Giannella several years ago offered two such principles. The first is the principle of free exercise neutrality that "permits and sometimes requires the state to make special provision for religious interests in order to relieve them of both direct and indirect burdens placed on the free exercise of religion by increased governmental regulation."16 Such a provision is consonant with the "protected civil right" nature of religious liberty, but in accordance with the general neutralist position such provisions must be extended to other similar groups if there are any.

The second principle is that of political neutrality. Its aim is "to assure that the establishment clause does not force the categorical exclusion of religious activities and associations from a scheme of governmental regulations whose secular purposes justify their inclusion."17 Several examples might clarify the concept: If a local government is
distributing excess cheese and bread to the poor through neighborhood organizations, church groups could be neither given exclusive rights to distribute the foodstuffs nor excluded from doing so. If government rents neighborhood buildings as polling places, churches could be neither preferred nor excluded from participation. Obviously equal access legislation fits within the strict neutrality concept. At the same time, if a church does participate in secular programs, under the neutrality principle it would have to keep the same records and maintain the same standards as other participants.

Objections to the Strict Neutrality Principle

A number of objections have been raised to the neutrality principle and we now turn to them. First is the objection that strict neutrality "guts" the religion clauses of any substantive meaning; this objection argues that if religious groups, individuals and interests are to be treated equally with others then the religion clauses are irrelevant—surely not a situation the Founders intended.

It is true that very much of religious activity and all of religious thought are fully protected in the speech, press, and assembly clauses of the First Amendment, as well as by the due process and equal protection clauses, etc. Double protection serves no additional function. Unlike the speech, press and assembly clauses, however, the religion clauses are twofold, prohibiting the establishment of religion as well as guaranteeing its free exercise. The recognition of an independent liberty must be such that it offends neither one nor the other. Classification in terms of religion may tend to discriminate either by favoring religious interests at the expense of other similarly situated interests or by burdening religious interests in such a way as to have a "chilling effect" on religious liberty. The most equitable solution to this dilemma is to treat religious groups and interests like similar groups and interests. For example, a religious group seeking funds for its projects would have to conform to the same fundraising rules and accounting standards as other nonprofit groups.

Precisely because religious liberty is an independent, substantive right, it functions as an indicator of the need to protect other groups and limit government intrusion into their affairs as well as into its own. Religious liberty is a protected legal right, but not a uniquely privileged one, that is, it gives no rights on the basis of religious commitment that do not extend equally to similar interests. In that sense it is a qualified legal right—qualified by the Establishment clause.

A second objection holds that strict neutrality will limit religious liberty, that is, religious groups will be required to live under the same government regulations, abide by such things as affirmative action goals, file informational tax returns, etc. in the same manner as other not-for-profit organizations. That objection is partially valid, and designedly so. There is a cost to be borne for living in an organized society and while that cost is not borne equally under the neutrality principle, churches and other religious groups ought to be paying the same price and sharing the same burdens as other similar groups. If they do not, they are in a uniquely privileged position which is not something the Founders intended and which is a major objective of the
Establishment clause to avoid. Does this mean churches would have to pay taxes under this principle? No, so long as other not-for-profit groups do not.

There is another side to this. Bureaucracies can be burdensome; regulations can be unreasonable. Religious groups may often find themselves resisting government intrusions, opposing new regulations or reporting requirements, etc. Their input into the policy process is useful and healthy; churches can act as a brake on unnecessary government expansion and protect not only religious interests but the interests of others in society as well. Strict neutrality does not limit religious liberty; it only removes religious privilege.

A third objection is that strict neutrality is only a smokescreen behind which to usher in massive aid to religious schools at the expense of the public schools. Several considerations are relevant. Religious schools seeking funds would need to conform to the same hiring, certification, accrediting, admissions and attendance standards, the same curriculum and textbook requirements and submit to inspections and oversight at the same level as other publically funded schools. This is not at all the Religious Right agenda or that of the parochial schools. Under such conditions there is unlikely to be a rush for funding. The real advantage, if there is one in this area, is to stimulate competition and innovation in education by groups willing to accept government regulations, a competition many public schools desperately need.

A fourth objection is that acceptance of strict neutrality would undermine decades of court precedents and open the floodgates to a torrent of cases testing the limits of neutrality. The Supreme Court has increasingly been using the language of neutrality (although not consistently) and many of its holdings are consistent with the principle. Acceptance would not, for example, undermine the three-pronged test for Establishment Clause cases, except that entanglement would need to be refined. One advantage, if the principle were accepted, would be more consistently decided cases, a major dividend.

A fifth objection is that “similarly situated” is a vague term fraught with potential conflict and abuse. Similar in what? How broad must the category be? Who gets to decide? One model is nonprofit organizations under the I.R.S. 501(c)3 category, which includes charitable, literary, recreational, fraternal, scientific, social and educational groups. The neutrality principle is built on the realization that in most legally significant dimensions religiously motivated individuals and groups are similar to their secular counterparts. Unfortunately the use of a strict neutrality principle will not do away with lawsuits, but testing the contours of similarity is precisely what Courts do best.

The Values of Neutrality

Having attempted to spell out and counter the major objections to strict neutrality, it may be appropriate to end with a brief list of the perceived values of adoption of such a principle. They appear to be the following:

1. The integration of free exercise and nonestablishment clauses into a coherent, consistent, comprehensible principle which is faithful to the intentions of the Founders, responsive to contemporary constitu-
tional values of due process and equal protection, cognizant of current political and economic realities, and defensible as a fair and equitable rule of law.

2. Equal protection for nonreligious groups and individuals that are similar to religious groups and individuals.

3. Establishment of a principled reason for bringing the secular components of religious activities into conformity with the standards and procedures required for other not-for-profit groups and activities.

4. A stimulus for religious groups which currently seek to influence government policy to undertake protection of rights for society while they protect their own.

Whether the Courts will accept a neutrality principle depends in large measure on whether it is understood, analyzed, critiqued, developed and ultimately accepted or rejected by the intellectual community which deals with church-state issues. For that to happen the principle must be given far more attention than it has yet received.

FOOTNOTES

1The concept was first articulated by Philip Kurland, Religion and the Law, Chicago, Aldine Publishing Co., 1962.
3The following typology is adapted from an earlier article, "James Madison and Religious Equality: The Perfect Separation," The Review of Politics, Vol. 44, No. 2, April, 1982, p. 163.
5For a credible discussion of this point, see Michael Malbin, Religion and Politics: The Intentions of the Authors of the First Amendment, Washington, D.C., American Enterprise Institute, 1978.
10Zorach v Clausen, 343 U.S. 306 at 310 (1952).
11"James Madison and Religious Equality," Id.
13Philip B. Kurland, Religion and the Law, p. 18.
14Id.
17Id.